Midwestern Personnel Services, Inc. *and* Chauffeurs, Teamsters and Helpers Local Union No. 215, a/w International Brotherhood of Teamsters, AFL–CIO, *and* River City Holdings, Inc., d/b/a Rockport Concrete Co., Boonville Concrete Co. and Daviess County Ready-Mix, Party in Interest *and* Chauffeurs, Teamsters and Helpers Local Union No. 100, a/w International Brotherhood of Teamsters, AFL–CIO, Party-in-Interest. Cases 25–CA–25503–2, 25–CA–25823–3, and 25–CA–25978–5

June 21, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On February 9, 2000, Administrative Law Judge Jane Vandeventer issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Midwestern Personnel Services, Inc., Olive Branch, Mississippi, and Louisville, Kentucky, its officers, agents, successors, and assigns shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Within 14 days from the date of this Order, offer full reinstatement to the below-named employees to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision:

Brian Aldridge	Henry T. Langdon Jr.
Chris Bolin	Randy Leinenbach
William Buzzingham	Robert Linendoll Jr.
Wade Carter	Chris Means
Anthony D. Clark	Jeffrey Metcalf
Steve Collins	Chris Pentecost
Timothy Cronin	Michael Pettit
Jerry Fickas	Robert Taylor
John Fritchley III	Scott Taylor
Donald Harris	Randal Underhill
Greg Harris	Eric Webster
Michael Herr	Gary Williams
Preston Kellams	David Wyatt

2. Substitute the following for paragraph 2(b) and reletter the subsequent paragraphs.

"(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of the above-named employees, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to reinstate employees after the end of a strike because they have engaged in an unfair labor practice strike.

[1] The Respondent has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent argues, for the first time in its brief to the Board, that its contract with Teamsters Local 836 was a valid and enforceable 8(f) prehire contract. Sec. 8(f) of the Act, by its terms, applies only to employers engaged in the building and construction industry. We note that the Respondent's president, Samuel Ware, testified without contradiction that the Respondent is not an employer primarily engaged in the construction industry. Thus, we reject this untimely argument.

The Respondent also argues, inter alia, that the unfair labor practice strike was converted to an economic strike by its signing of the informal settlement agreement on February 18, 1998. We find no merit in this argument. The judge properly found that prior to the submission of the March 27, 1998, unconditional offer to return to work there had been no notice posting, no complete remedying of the pending unfair labor practices, and no assurances given to the employees that they would not be discharged for striking.

[2] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer full reinstatement to the following employees to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest:

Brian Aldridge	Henry T. Langdon, Jr.
Chris Bolin	Randy Leinenbach
William Buzzingham	Robert Linendoll, Jr.
Wade Carter	Chris Means
Anthony D. Clark	Jeffrey Metcalf
Steve Collins	Chris Pentecost
Timothy Cronin	Michael Pettit
Jerry Fickas	Robert Taylor
John Fritchley III	Scott Taylor
Donald Harris	Randal Underhill
Greg Harris	Eric Webster
Michael Herr	Gary Williams
Preston Kellams	David Wyatt

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of the above-named employees, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

MIDWESTERN PERSONNEL SERVICES, INC.

Steve Robles, Esq., for the General Counsel.
James U. Smith III and *W. Kevin Smith, Esqs*. (*Smith & Smith*), of Louisville, Kentucky, for the Respondent.
Ronald Allen, Esq. (*Fine & Hatfield*), of Evansville, Indiana, for the Party-in-Interest.

DECISION

STATEMENT OF THE CASE

JANE VANDEVENTER, Administrative Law Judge. This case was tried on September 20 and 21, 1999, in Evansville, Indiana. The complaint alleges that Respondent violated Section 8(a)(1) of the Act by instructing employees to designate a particular union as their bargaining representative, by threatening them with discharge if they did not, and threatening employees with discipline, loss of employment and with legal action if they engaged in a strike. The complaint also alleges that Respondent violated Section 8(a)(2) of the Act by assisting and supporting a particular union and by recognizing it in the absence of the uncoerced support of a majority of employees. The complaint specifically requests that no remedy be ordered for the foregoing alleged violations because of a previous informal settlement agreement. Finally, the complaint alleges that Respondent violated Section 8(a)(3) of the Act by failing and refusing to reinstate unfair labor practice strikers immediately on their unconditional offer to return to work. The Respondent filed an answer denying the essential allegations in the complaint. Party-in-Interest River City Holdings, Inc. (RCH), filed a motion seeking to be dismissed as a party-in-interest. After conclusion of the trial, posttrial briefs were filed which I have considered.

Based on the testimony of the witnesses, including particularly my observation of their demeanor while testifying, the documentary evidence, and the entire record, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Tennessee corporation with offices and places of business in Olive Branch, Mississippi, and Louisville, Kentucky, where it is engaged in the business of personnel leasing, i.e., the provision of personnel and personnel services to other businesses. During a representative 1-year period, Respondent provided services valued in excess of $50,000 directly to businesses outside Mississippi. Accordingly, I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

I find the Charging Party (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. UNFAIR LABOR PRACTICES

A. The Facts

RCH is a corporation with an office in Evansville, Indiana, and is in the business of selling concrete mix and related products from various locations, including Boonville and Rockport, Indiana, and Daviess County, Kentucky (also referred to as the Owensboro location). Respondent provides transport and mixer truckdrivers to RCH at these three facilities, but not at RCH's approximately 10 other facilities. Respondent has had a business relationship with RCH since 1989.[3] In a related representation proceeding, the Regional Director for Region 25, on April 2, 1998, found that Respondent and RCH were not joint employers, and found appropriate the following unit of Respondent's employees:

> All transport and mixer truck drivers employed by Midwestern Personnel Services, Inc. who perform services for River City Holdings, Inc. at its Boonville and Rockport, Indiana and Daviess County, Kentucky facilities; BUT EXCLUDING all batch employees, mechanics, office clerical employees, professional employees, and all guards and supervisors as defined in the Act.

On October 28, 1998, the Board affirmed the decision of the Regional Director in the representation case, which was thereafter held in abeyance pending the outcome of the instant matter.

Respondent oversees its employees who work at the three RCH facilities from its Louisville, Kentucky office. Jim Teegarden is the area manager of that location. In addition, there are three dispatcher-managers, one at each RCH location, who are responsible for day-to-day dispatch and supervision of the drivers. In the related representation case, the parties stipu-

[3] While Respondent currently has one collective-bargaining contract with a local union in the Norfolk, Virginia, area, there is no collective-bargaining history with respect to the employees involved prior to 1997.

lated that these individuals are supervisors within the meaning of Section 2(11) of the Act.

1. The Party-in-Interest

RCH was named in the case caption as a party-in-interest, and has moved to be dismissed from the case. The effect of naming a party as a "party-in-interest" is to confer on that party the due process rights of notice and an opportunity to be heard and the right to present evidence, as set forth in the Board's Rules and Regulations at Section 102.38. Normally, a party who may have an interest in any remedy which might be ordered in a proceeding by virtue of a contractual relationship, for example, is named as a party-in-interest. Although RCH was originally named as a charged party in the instant charges, the charges were later amended to delete RCH as a potential respondent. RCH was found not to be a joint employer in the related representation case, and is not a respondent in the instant matter. The General Counsel stated that RCH was named as a party-in-interest[4] in the pleadings so that it would have notice of the proceedings and the right to appear and present evidence if it desired to do so. The only matter presented at the hearing by RCH was its motion to dismiss. It is undisputed that RCH has a longstanding contractual relationship with Respondent, which contract deals with the employees who drive its trucks. As its status as a "party-in-interest" confers apparently beneficial rights, and does not hold the threat of independent liability for any potential unfair labor practices, it is difficult to understand the reluctance of RCH to receive notice of these proceedings and to have an opportunity to be heard. I deny its motion.

2. The recognition of Local 836

Respondent's president, Samuel Ware, testified that in approximately April 1997,[5] he was informed by RCH that it had secured a contract to supply cement products to a jobsite which was referred to as the "AK Steel job." For this purpose, RCH planned to use its Rockport facility, and informed Respondent that it would need additional employees and that the AK Steel job was a union jobsite. According to Ware, he was informed that the Rockport employees needed to have union cards. The AK Steel job was expected to last about 8 months.

At that time, Respondent had a collective-bargaining relationship with Teamsters Local Union 836, located in Middletown, Ohio, covering some 40 employees in York, Pennsylvania, which were leased to an employer other than RCH. Sometime in late May, Ware telephoned the Local 836 business agent with whom he dealt, Tom Kinman, and asked Kinman if he could "come into" Indiana. Receiving an affirmative answer, Ware arranged with Kinman that he would come to Indiana to talk with Respondent's employees at Rockport. At the time, there were approximately 7 employees at Rockport, and the number of drivers there was expected to rise to about 16. Respondent employed approximately 40–50 employees at all three RCH locations.

Manager Teegarden testified that President Ware informed him in late May that Respondent already had a contract with Local 836 and that he was going to try to get an addendum "off of that contract that we already had in place with them." On instructions from President Ware, Manager Teegarden contacted Kinman and told him about Respondent's operation and the hours of the employees. Kinman's visit to Indiana occurred on June 2.

Four employees testified about the meeting which was held at the end of the workday on that date. The meeting took place at a restaurant called the Junction which was near the Boonville plant at about 5:15 in the afternoon. Both Tom Kinman of Local 836 and Manager Teegarden were present, as were the seven drivers then employed by Respondent at Rockport. It is not disputed that Teegarden opened the meeting and introduced Kinman to the drivers. Employee Eric Webster testified Manager Teegarden informed the employees they had to be union to be on AK Steel property, and if they signed the union card Kinman had given them, they would have a job, but if they did not, they would not have a job. Employee Fickas testified that Teegarden told employees they had to join the Union if they wanted a job at Rockport.[6] Fickas also recalled Teegarden telling the employees that Respondent would "do an addendum" to its existing collective-bargaining agreement with Local 836.

Manager Teegarden testified that at the start of the meeting he passed around an attendance list and secured the signature of each employee present. It is undisputed that Teegarden did not remain in the meeting room for the entire meeting, but left for some portion of it. Estimates of the amount of time he remained in the meeting ranged from 20 minutes to 35 minutes. Manager Teegarden testified that after he had been absent from the meeting for about 45 minutes, a driver asked him to return to the meeting for a question. He recalled he was asked what would happen if the drivers did not want to join the Union. Teegarden testified he told the drivers if they voted the Union in, they would have to join the union, "or something to that effect." He went on to claim he told them the reason for this is "Indiana is not a right-to-work state," although in testifying he tried unsuccessfully to say this phrase two times, and was finally able to repeat it after counsel on the third try.[7] Employees testified there was no vote taken at this meeting, but they all signed cards for Local 836.

President Ware testified he telephoned Kinman and negotiated a three-page addendum to the York, Pennsylvania, contract which addendum set forth the existing wages and benefits of Respondent's Rockport drivers, except for a 20-cent-per-hour raise which Kinman asked for and Ware agreed to. The remainder of the contract was identical to that which was in force for the York drivers. The wages, hours, and working conditions reflected in the addendum were identical to those which had previously existed for Respondent's Rockport drivers, with the exception of the 20-cent-per-hour raise. No employees were present during this telephone call. Ware did not testify as

[4] Although the term "party-of-interest" was used in the pleadings, the more common usage is "party-in-interest."

[5] All dates hereafter are in 1997, unless otherwise specified.

[6] Webster and Fickas displayed the most detailed recollection of the four employees who testified. Their testimony is credited. The other two employees, Linendoll and Means, recalled little of the June 2 meeting aside from their testimony that Teegarden told them they had to sign a card (or join the Union) in order to have a job. Means also testified that on the following day, Dispatcher/Manager Sam Powers told all the drivers that they would have to join Local 836 in order to keep their jobs. Sam Powers, stipulated as a supervisor in the representation case, did not testify. However, none of the other three employees corroborated Means on this point, and I do not rely on it.

[7] I do not credit Teegarden's testimony over that of the four employees regarding his answer to this crucial question. He was unsure of his testimony on this point and was literally unable to enunciate the phrase he claimed to have said at the time.

to exactly when he negotiated this agreement, but he did testify that the final copy, which was admitted as an exhibit, was typed in his office on June 2. It was on this same date, after the workday was over, that Kinman met with the Rockport drivers and secured their union authorization cards. According to Ware, Kinman faxed copies of the signed cards to Ware on the following day, June 3. At another point in his testimony, Respondent's counsel asked Ware if "after" he received the cards authorizing Local 836, did he negotiate a contract with Kinman, to which he agreed. Kinman did not testify at the trial.[8] Despite the apparent conflict in Ware's testimony, I find that he "negotiated" and agreed on a contract covering the Rockport drivers on June 2 before the drivers met with Kinman.

3. The events of July through October

During July and August, there were several developments. Some of the Rockport drivers, as well as some of the drivers at the Boonville and Daviess County plants, signed union authorization cards for the Charging Party Union. The Union filed unfair labor practice charges against Respondent on July 29. According to Lewis Smith, then the secretary-treasurer of the Union, the Union also filed internal union charges against Local 836 alleging that it had violated internal union policy by coming into the Union's geographical territory and entering into a contract with Respondent. Also during this period, Local 836 merged with another Teamsters Local, Local 100 of Cincinnati, Ohio. This merged local will henceforth be referred to as Local 100 or Local 836/100.

By letter dated September 11, Local 100 informed Respondent it was returning the union dues remitted for the month of August, and requesting dues for Respondent's employees henceforth be remitted to the Union. This followed a letter from the president of Local 100 to the International Union to the effect that it did not oppose "the transfer of these [Rockport] employees into Local Union No. 215, Evansville, Indiana." Local 100, however, did not actually disclaim interest in representing Respondent's employees until a letter dated December 5. There is no evidence of Local 100's position or of any action by Local 100 with respect to the collective-bargaining agreement, e.g. whether it would still administer the agreement, whether it still considered the agreement to be valid, or whether it desired to transfer administration of the agreement to the Union.

President Ware testified sometime during August or September, Kinman called him and told him that Local 100 could no longer represent Respondent's employees. Despite this, Ware testified he still believed the collective-bargaining agreement to be binding, not only on Respondent, who had signed it, but also on the Union, which had neither negotiated nor signed it. At the same time, Respondent continued to refuse to recognize the Union as the bargaining representative of Respondent's employees, whether solely at Rockport or in a broader unit.

By letter dated October 1, the Union informed Respondent it represented a majority of Respondent's drivers at the Rockport, Boonville, and Daviess County plants, and requested recognition, apparently in a unit comprising all three locations. Although there were subsequent discussions between the parties which will be summarized below, Ware testified Respondent never recognized the Union in any unit.

[8] Kinman was apparently equally available to all parties, and I draw no inferences from any party's failure to call him as a witness.

4. The events of December

In late November, according to Manager Teegarden, he learned through an anonymous telephone call of the possibility of a strike against Respondent. He held a meeting with employees, but the rumor was not confirmed by them. Teegarden warned the employees the contract with Local 100 contained a no-strike clause. The employees told him they wanted to hear what President Ware had to say.

On December 1 and 2, pursuant to a request by Teegarden, President Ware visited the three plants and spoke to the employees. According to employees Webster and Fickas, Ware told the employees he had heard rumors that the employees might strike. He told them because of the no-strike clause in the collective-bargaining agreement with Local 100, the employees could be fired if they struck Respondent, and they could also be sued. Ware's testimony was consistent with that of the employees on this point. Ware also testified that during these meetings some employees told him they wanted a local union to represent them, not one from Ohio.

A few days later, Ware sent Rockport, Boonville, and Daviess County employees a letter dated December 3 in which he reiterated his position that the collective-bargaining agreement was in force, "until proven different by the NLRB at the hearing scheduled for January 20, 1998," and its no-strike clause rendered any strike action by the employees unprotected. He further reiterated they could be disciplined or sued for such activity.

5. Discussions between Respondent and the Union

Following the Union's October 1 demand for recognition, there was no contact between the parties until December. In early December, Ware received a disclaimer letter from Local 100. At around the same time, he telephoned Union Secretary-Treasurer Lewis Smith and offered to meet concerning Respondent's employees. On about December 16 President Ware met with Lewis Smith and Joe DiMatteo at an O'Charley's restaurant. In his testimony, Ware described this meeting as "informational." It is undisputed that Respondent and the Union discussed the language of the Local 100 collective bargaining agreement, pension issues, whether Respondent and RCH were joint employers, and settlement of the unfair labor practice charges. Ware subsequently, in a December 19 letter, made a written offer to recognize the Union in exchange for withdrawal of the unfair labor practice charges.

On December 22, in a telephone call to follow up on this letter, Lewis Smith and Ware discussed the previously raised issues, but did not resolve any of them. Smith stated he would send Ware some information concerning the Teamsters pension plan, and he subsequently did so. On January 14, 1998, Respondent and the Union held their second meeting, at which they exchanged initial contract proposals and went over each of the proposals. Agreements on a few articles of a potential contract were made, but major sticking points—including recognition, pension, duration, and others—remained. At the close of this essentially first bargaining session, President Ware remarked he believed the parties were at impasse.

6. The strike

On the evening before the January 14, 1998, meeting described above, there had been a meeting of Respondent's employees at the Union's office. Lewis Smith and DiMatteo reported to the employees on the progress of their contacts with Respondent up until that date, January 13, 1998. There were a

number of issues raised by employees or discussed between Lewis Smith and employees about the conduct of Respondent. According to the testimony of Joe DiMatteo and Lewis Smith, employees complained about being harassed and threatened by Respondent concerning their right to strike. They complained Respondent was still trying to enforce the no-strike clause in Respondent's agreement with Local 836/100, even though that union had disclaimed interest in representing the employees. President Ware's oral threats to enforce the no-strike clause and impose discipline on employees who struck Respondent at the early December meetings as well as his letter repeating those threats were complained of by employees. The employees also expressed great frustration at the lack of any progress in the Union's December discussions with Respondent. After some discussion among the meeting, a strike vote was suggested by an employee and one was taken. The employees voted to strike Respondent, but acceded to DiMatteo's suggestion they await the outcome of the following day's discussions with Respondent, and empower DiMatteo to decide on the timing of the strike.

After the January 14, 1998, meeting produced no agreement on the various issues between the parties, DiMatteo, on January 15, 1998, decided the strike should begin on January 17, 1998, and began to inform the employees. On the following day, January 16, 1998, both Respondent and RCH signed an informal Board settlement agreement which dealt with the allegations of 8(a)(1) and (2) violations surrounding the June 2 meeting and subsequent contract with Local 100. On January 21, 1998, the Union filed additional unfair labor practice charges alleging the December 1 meeting comments and the follow-up letters by President Ware as violations of Section 8(a)(1). The Union did not enter into the January 16, 1998, settlement agreement, and this agreement was never approved by the Region.

On January 17, 1998, the Union began a strike against Respondent. It is not disputed that throughout the strike, picketers carried signs which read, "On Strike," identified Respondent, and included the words, "unfair labor practices." These signs were supplied by the Union and no other signs were used. The strike continued until March 27, 1998, on which date the Union made an unconditional offer to return to work on behalf of the striking employees. The parties stipulated there were 26 strikers on that date. The names of the 26 individuals were also stipulated.

7. Discussions and settlement during the strike

On February 12, 1998, Lewis Smith and DiMatteo met with Respondent's counsel, Jim Smith, and a federal mediator at a restaurant to discuss a possible settlement of the entire matter. The parties discussed some of the terms of a potential collective-bargaining agreement which had been discussed at the January 14, 1998, meeting, e.g., duration, pension, recognition by Respondent, recognition or a letter guaranteeing the contract by RCH, insurance, and wages. Seniority of returning strikers was also discussed, as was a possible agreement on a representation election to be conducted by the Board. No resolution was reached on any of the issues raised.

On February 18, 1998, Respondent and RCH signed an informal settlement agreement purporting to remedy the alleged unfair labor practices of June and December. By this date, the expected 8-month duration of the AK Steel job was nearly at an end. In addition to an undertaking by both Respondent and RCH to cease to enforce the collective-bargaining agreement which Respondent had entered into with Local 836/100, the settlement included as a remedy the requirement that a notice be posted. The Union did not enter into the settlement agreement. The settlement agreement was approved by the Regional Director for Region 25 on February 27, 1998. The settlement agreement contained a reservation of evidence provision as follows:

> SCOPE OF THE AGREEMENT—This Agreement settles only the allegations in the above-captioned case(s), and does not constitute a settlement of any other case(s) or matters. It does not preclude persons from filing charges, the General Counsel from prosecuting complaints, or the Board and the courts from finding violations with respect to the matters which precede the date of the approval of this Agreement regardless of whether such matters are known to the General Counsel or are readily discoverable. The General Counsel reserves the right to use the evidence obtained in the investigation and prosecution of the above-captioned case(s) for any relevant purpose in the litigation of this or any other case(s), and a judge, the Board and the courts may make findings of fact and/or conclusions of law with respect to said evidence.

The notice which was a part of the settlement agreement was posted by Respondent from approximately April 20 through June 20, 1998.

B. Discussion and Analysis

1. The settlement agreement

Initially, it must be determined whether the settlement agreement bars litigation of the alleged 8(a)(1) and (2) violations which occurred in June and the 8(a)(1) allegations in early December. The General Counsel has alleged this conduct violates the Act, has asked that findings of fact and conclusions of law be made thereon, but has requested no remedy be ordered, as the conduct was the subject of an informal unilateral settlement agreement, and a notice was posted to remedy the alleged violations from approximately April 20 through June 20, 1998. The settlement agreement contained a reservation of evidence clause as set forth above.

It is well settled that conduct which has been the subject of a settlement agreement may not be litigated in a subsequent proceeding except under certain circumstances, e.g., where the conduct is used as background evidence (see, e.g., *Mooresville IGA Foodliner*, 284 NLRB 1055 (1987)), where the settlement agreement has been set aside for valid reasons, or where the right to litigate the conduct has been specifically reserved. *Hollywood Roosevelt Hotel Co.*, 235 NLRB 1397 (1978). The Board has recently reaffirmed this general principle in *B & K Builders,* 325 NLRB 693 (1998). In that case, the Board specifically held that a reservation of evidence clause identical to the one in this case acted effectively to permit litigation of presettlement conduct.

Even more recently, the Board has held in a case similar to the instant case, in which the reinstatement rights of strikers was an issue, that an identical reservation of evidence clause permitted the litigation of presettlement conduct where that conduct was determinative of the nature of a strike, i.e., whether the strike was an unfair labor practice strike or an economic strike. *Outdoor Venture Corp.*, 327 NLRB 706 (1999). On the basis of this clear and specific Board precedent, I find the presettlement conduct may be litigated in this proceeding.

2. The recognition of Local 836/100

The Board has long held that an employer may not assist a union to the extent that employees are encouraged, influenced, or coerced into choosing that union to represent them. While such assistance is often overt, even more subtle assistance may constitute a potent advantage to the union, and may violate the Act. See, e.g., *Sound One Corp.*, 317 NLRB 854, 859 (1995); *Alton Belle Casino*, 314 NLRB 611, 628 (1994***); Famous Castings Corp.***, 301 NLRB 404, 407 (1991); *Vernitron Electrical Components,* 221 NLRB 464, 465 (1975).

In this case, several factors show Respondent's assistance to Local 836, later Local 100. Respondent contacted the Local 836/100 representative, Kinman, and invited him to come and talk to the employees. More than this, President Ware actually offered to sign a contract covering the Rockport employees in their first conversation, prior to any indications of employees' sentiments. Most terms of the collective-bargaining agreement were discussed and some were agreed on in the same conversation. On June 2 Kinman and Ware spoke again on the telephone and finalized agreement on a contract, changing only one term of employment from existing employment terms and conditions (the 20-cent-per-hour-increase). No employee was present on either telephone call, and there is no evidence of any employee input into these "negotiations." Ware had the contract typed up in his office on that day. All this occurred on the same day Kinman met with employees, but before any meeting with employees. Ware did not receive any evidence of employee sentiment concerning this union until the next day, June 3, when Kinman sent him copies of seven authorization cards by datafax. No neutral third party was asked to check or authenticate the authorization cards.

At the meeting which Kinman held with employees after work on June 2, Respondent's Manager Teegarden not only introduced the Local 836 representative, but also required all the drivers to sign an attendance list showing they were present at the meeting with Kinman. At that meeting employees were not offered any chance to comment on what would be negotiated on their behalf; they were simply informed as to what had already been negotiated. Finally, Manager Teegarden threatened the employees with loss of their jobs if they did not sign the cards for Local 836.

Even in the absence of threats the actions of Respondent in arranging and attending the union meeting, as well as taking roll there constitute unlawful assistance to Local 836/100. The taking of a written attendance list would certainly imply to employees their attendance and actions at the meeting were being watched and noted by Respondent. Such actions taken together express to employees the employer's preference for a particular union. *Famous Castings Corp.*, supra at 407; *Vernitron Electrical Components*, supra at 465. When the additional fact the drivers' employment was threatened if they failed to designate Local 836 as their representative is considered, the conclusion becomes inescapable that the employee sentiment as expressed by their signing of authorization cards on June 2 was coerced. *Kosher Plaza Supermarket*, 313 NLRB 74, 85 (1993).

Respondent's actions in assisting Local 836 in negotiating with and recognizing it in the absence of an uncoerced majority, and in entering into a collective-bargaining agreement with it, all violate Section 8(a)(2) of the Act. In addition, these actions and the threats of loss of employment made to employees on June 2 violate Section 8(a)(1) of the Act.

3. The alleged threats in December

Respondent's undisputed statements to employees in early December to the effect that any strike activity they might engage in would be unprotected, and would subject them to discipline and possible discharge were based on the faulty premise that a valid collective-bargaining agreement containing a valid no-strike clause existed. President Ware clothed his threats of discharge to employees in the language of a spurious "legal position." Such language does not act to insulate this conduct from scrutiny.

There was, in fact, no valid collective-bargaining agreement covering the employees. As President Ware freely admitted, Respondent never recognized the Union, and certainly never entered into a collective-bargaining agreement with it. With respect to the collective-bargaining agreement with Local 836/100, it was void, since it was entered into in violation of Section 8(a)(2) of the Act, as noted above. Certainly the no-strike clause in this void agreement could not act to legitimate Ware's threats. Respondent certainly cannot use even this spurious agreement in an attempt to legitimize its threats to the employees at the Boonville and Daviess County locations; the Local 836/100 agreement never purported to cover the employees at those two locations. The oral threats at meetings, as well as the threat by letter to employees that strike activity could result in discipline or a lawsuit violated Section 8(a)(1) of the Act.

Respondent has argued that the collective-bargaining agreement referred to by President Ware was actually a valid agreement, and had been adopted by the Union. There is support for neither of these contentions. No true collective-bargaining agreement can exist where the very foundation of a collective-bargaining relationship, recognition of the collective-bargaining representative, is absent, and there is no dispute that Respondent never recognized the Union as such representative. Respondent has pointed to no evidence which would clearly and unequivocally show the Union adopted, ratified, or executed the June 2 agreement. In an attempt to support its defense, Respondent has cited testimony from Lewis Smith, in response to leading questions, to the effect the June 2 collective-bargaining agreement was a starting point for the negotiations. In view of the fact the Union had filed unfair labor practices alleging the June 2 agreement was invalid, Lewis Smith's testimony on this point does not show clearly that the Union had adopted or ratified the June 2 agreement.

Respondent's argument the "negotiations" between Respondent and the Union were ordinary collective bargaining (and therefore the strike was solely an economic one) is likewise inconsistent with its position the June 2 contract was a valid one. If Respondent had an enforceable agreement, the bargaining would be, at most, mid-term bargaining, and the assertedly valid no-strike clause would then block a legal strike. Respondent has not gone so far as to suggest this latter idea, thus, undermining its defense.

4. The strike

Longstanding Board precedent teaches that so long as unfair labor practices are one of the motivating factors in a strike, the strike will be considered to be an unfair labor practice strike. See, e.g., *Dorsey Trailers, Inc.*, 327 NLRB 835, 856 (1999); *Mohawk Liqueur Co.*, 300 NLRB 1075, 1085 (1990). This characterization is of crucial importance because of the difference in the reinstatement rights of the strikers. Unlike eco-

nomic strikers, unfair labor practice strikers are entitled to reinstatement immediately upon their unconditional offer to return to work. *Dorsey Trailers, Inc.*, supra at 856.

In the instant case, the record evidence supports the conclusion Respondent's unfair labor practices were a contributing factor to the employees' decision to strike. The timing of the unfair labor practices, the discussion at the meeting of January 13, 1998, and the picket signs of the strikers, all tend to show that the strike was motivated by the unfair labor practices of Respondent. Relatively fresh in the minds of the employees were the threats of Respondent to discharge them made in December. The fact that these threats were explicitly premised on the void collective-bargaining agreement which had been foisted on the employees by Respondent in violation of Section 8(a)(2) some 6 months earlier served to revive the employees' resentment of those events, and to stir fresh anger that Respondent was still inconsistently asserting the validity of that contract even in the face of Local 836/100's disclaimer. While it is clear that the employees' frustration at the lack of an agreement between Respondent and the Union was one motivating factor in their decision to strike, it was not the only factor. In addition, their frustration over this lack of a resolution is properly characterized as frustration over the continuation of Respondent's unfair labor practices and refusal to resolve them since, as discussed below, the discussions between Respondent and the Union were actually settlement discussions, rather than traditional collective bargaining over economic issues.

Respondent's attempt to characterize the strike as solely an economic one is doomed to failure. In support of this position, Respondent has argued that its discussions with the Union were actual collective bargaining. At the time these two face-to-face meetings and several phone conversations took place, Respondent was taking the position that it was already party to a valid collective-bargaining agreement negotiated with a different local union. In fact, Respondent never recognized the Union as the representative of its employees, and therefore, it is inconsistent for Respondent to assert it was "bargaining" with the Union. As shown by the fact that at the outset of discussions, withdrawal of the unfair labor practice charges was offered by Respondent as a quid pro quo for recognition and bargaining, these discussions were essentially settlement discussions. From the welter of contradictory concepts and theories asserted by Respondent, no clear defense emerges. It is apparent that Respondent's defense that the strike was solely an economic one cannot stand.

The same holds true for Respondent's argument that the strike was somehow converted to an economic strike by discussions between the Union and Respondent's attorney attended by a federal mediator on February 12, 1998. At that meeting, specific terms of a potential collective-bargaining agreement were indeed discussed between the parties, but the subject of a representation election was also discussed, and the fact that Respondent had not recognized the Union was still true on that date (and remains true to the date of the trial). Neither were the unfair labor practice charges settled between the parties at the meeting. It is therefore clear that this one meeting, which partook more of the character of settlement discussions than of collective bargaining, cannot possibly have the effect of converting an unfair labor practice strike to solely an economic one.

Neither can the informal settlement agreement which was signed by Respondent on February 18, 1998, operate to change the character of the strike in some manner, or to dissipate the effects on employees of Respondent's unfair labor practices. There could be no instant disappearance of these unfair labor practices and their effects on the date of the execution of the settlement agreement. As recently held by the Board in *Outdoor Venture Corp.*, supra at 709, the posting of a notice for a full 60-day period is not to be taken lightly nor treated as merely a form. There was not and could not have been any effective remedy until the notice was posted, and posted for the full 60-day period. The unconditional offer to return to work was made on behalf of the employees by the Union on March 27, 1998, more than 3 weeks before the notice was initially posted by Respondent on April 20, 1998. On March 27, 1998, the remedy had not even begun to take effect, much less achieved its effect. I reject any contention that either Respondent's February 12, 1998, meeting with the Union or the informal settlement agreement converted the strike to an economic strike.

It is undisputed that the Union made an unconditional offer to return to work on behalf of the remaining 26 strikers on March 27, 1998, and that Respondent refused to reinstate them immediately, treating them instead as economic strikers. I find that Respondent's conduct in thus refusing immediately to reinstate the strikers violates Section 8(a)(3) of the Act.

There was evidence offered at the trial that at some time following the March 27, 1998, offer to return to work, some of the strikers were sent letters offering them certain work. The issue of reinstatement offers to these and other employees will be left to the compliance stage of this proceeding.

CONCLUSIONS OF LAW

1. By assisting and supporting Local 836/100, and by recognizing it in the absence of an uncoerced majority of employees having designated it as their collective-bargaining representative, Respondent has violated Section 8(a)(2) of the Act.
2. By threatening employees with loss of employment if they did not choose Local 836/100 to represent them, Respondent has violated Section 8(a)(1) of the Act.
3. By threatening employees with discipline and discharge for engaging in protected concerted activity, Respondent has violated Section 8(a)(1) of the Act.
4. By failing and refusing to reinstate employees who engaged in an unfair labor practice strike immediately upon their unconditional offer to return to work, Respondent has discriminated against these employees and has violated Section 8(a)(3) and (1) of the Act.
5. The violations set forth above are unfair labor practices affecting commerce within the meaning of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom and to take certain affirmative action necessary to effectuate the policies of the Act. I shall not recommend any additional remedy for the violations of Sections 8(a)(1) and (2) found above, as Respondent has previously posted a notice to employees.

Respondent having wrongfully refused to reinstate the following employees at the conclusion of the strike, I shall recommend that Respondent offer them immediate reinstatement to their former jobs, or, if such jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority and other rights and privileges:

Brian Aldridge	Henry T. Langdon Jr.
Chris Bolin	Randy Leinenbach
William Buzzingham	Robert Linendoll Jr.
Wade Carter	Chris Means
Anthony D. Clark	Jeffrey Metcalf
Steve Collins	Chris Pentecost
Timothy Cronin	Michael Pettit
Jerry Fickas	Robert Taylor
John Fritchley III	Scott Taylor
Donald Harris	Randal Underhill
Greg Harris	Eric Webster
Michael Herr	Gary Williams
Preston Kellams	David Wyatt

I shall also recommend that Respondent be ordered to remove from the employment records of the above-named employees any notations relating to the unlawful action taken against them and to make them whole for any loss of earnings or benefits they may have suffered due to the unlawful action taken against them, in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest, as computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, Midwestern Personnel Services, Inc., Olive Branch, Mississippi, and Louisville, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminating against its employees by failing and refusing to reinstate them upon their unconditional offer to return to work at the conclusion of the strike.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer immediate and full reinstatement to the below-named employees to their former jobs and, if those jobs no longer exist, to substantially equivalent jobs without prejudice to their seniority or other rights and privileges and make them whole in the manner described in the remedy section:

Brian Aldridge	Henry T. Langdon Jr.
Chris Bolin	Randy Leinenbach
William Buzzingham	Robert Linendoll Jr.
Wade Carter	Chris Means
Anthony D. Clark	Jeffrey Metcalf
Steve Collins	Chris Pentecost
Timothy Cronin	Michael Pettit
Jerry Fickas	Robert Taylor
John Fritchley III	Scott Taylor
Donald Harris	Randal Underhill
Greg Harris	Eric Webster
Michael Herr	Gary Williams
Preston Kellams	David Wyatt

Further, Respondent will remove from the employment records of the above-named employees any notations relating to the unlawful action taken against them.

(b) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records, if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its facilities in Rockport, Indiana, Boonville, Indiana, and Daviess County, Kentucky, and all other places where notices customarily are posted, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 25 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 27, 1998.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."